SUPREME COURT, U.S.

FILED
JUL 3 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 311

THE WASHINGTON TERMINAL COMPANY, *Petitioner,*

v.

ALONZO W. TAYLOR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN A. TRIMBLE
916 Union Trust Building
Washington, D. C. 20005
Attorney for Petitioner

Of Counsel:

HAMILTON AND HAMILTON
916 Union Trust Building
Washington, D .C. 20005

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Federal Rules of Civil Procedure Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	12

Appendix A—Judgment, United States Court of Appeals for the District of Columbia Circuit filed February 20, 1969 ..... 1a

Appendix B—Opinion of the United States Court of Appeals for the District of Columbia Circuit filed February 20, 1969 ..... 2a

Appendix C—Order of the United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing filed April 8, 1969 .... 10a

Appendix D—Notification of United States Court of Appeals for the District of Columbia Circuit concerning suggestion for en banc consideration dated April 8, 1969 ..... 11a

Appendix E—Verdict and judgment, United States District Court for the District of Columbia filed August 14, 1967 ..... 12a

Appendix F—Order of remittitur, United States District Court for the District of Columbia filed September 26, 1967 ..... 13a

Appendix G—Verdict and judgment, United States District Court for the District of Columbia filed March 18, 1968 ..... 14a

TABLE OF AUTHORITIES

CASES: Page

Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir., 1941) 10
Altrichter v. Shell Oil Company, 263 F.2d 377 (8th Cir., 1959) 10
Arkansas Valley Land and Cattle Co. v. Mann, 130 U.S. 69 (1889) 7
Dimick v. Schiedt, 293 U.S. 474 (1935) 7
Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933) 7
Grunenthal v. Long Island R.R. Co., 393 U.S. 156 (1968) 9, 10, 11
Linn v. United Plant Guard Workers of America, 383 U.S. 53 (1966) 7, 12
Neese v. Southern Railway Company, 350 U.S. 77 (1955) 8, 9, 10, 11
Southern Railway Company v. Neese, 216 F.2d 772 (4th Cir., 1954), reversed *sub nom.* Neese v. Southern Railway Company, 350 U.S. 77 (1955) 8
Union Pacific Railroad Company v. Hadley, 246 U.S. 330 (1918) 7

STATUTES:

45 U.S.C. § 51, *et seq.* (Federal Employers Liability Act) 3, 6

RULES:

Rule 59(a), Federal Rules of Civil Procedure (Title 28, U.S.C.) 3, 6, 7

MISCELLANEOUS:

Federal Practice, J. A. Moore, Vol. 6A ¶ 59.08[6], pp. 3836-3840 8
Federal Practice and Procedure, W. Barron & A. Holtzoff, Vol. 3 § 1302.1, pp. 349-350 (Wright Ed. 1958) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

THE WASHINGTON TERMINAL COMPANY, *Petitioner*,

v.

ALONZO W. TAYLOR, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 20, 1969 (App. A, page 1a).*

---

* The appendix to this petition is referred to herein as "App.", and the record certified from the Court below is referred to as "R". Petitioner was the defendant in the District Court, and was appellee in the Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, filed February 20, 1969, is reported at ... U.S.App.D.C. ..., 409 F.2d 145 (1969), and appears in App. B (pages 2a-9a). The verdict of the first trial in the District Court entered August 14, 1967, the order of remittitur entered September 26, 1967, and the verdict of the second trial entered March 18, 1968 appear in App. E, F, and G (pages 12a, 13a, and 14a, respectively).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 20, 1969, (App. A, page 1a). A petition for rehearing, timely filed, was denied by that Court* on April 8, 1969 (App. C, page 10a). The jurisdiction of this Court to review the action of the Court of Appeals is established under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in reversing the district court's order granting a remittitur or new trial where the basis of the reversal consisted of its own appellate appraisal of the evidence, thus conflicting with the recent decisions of this Court limiting appellate review of such orders and requiring affirmance where the action of the district court finds support in the record.

---

* An alternative suggestion for en banc consideration was included with the petition for rehearing, and, on April 8, 1969, the parties were informed by the Court of Appeals that no further action was anticipated with respect thereto, there not being a majority of the judges in regular active service in favor of having the case reheard en banc (App. D, page 11a).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 59(a), Federal Rules of Civil Procedure, Title 28, U.S.C., provides as follows:

> "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings and conclusions, and direct the entry of a new judgment."

STATEMENT OF THE CASE

This case was brought by the respondent in the United States District Court for the District of Columbia pursuant to the provisions of the Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.* The case was first tried before Judge Manuel L. Real on contested issues of liability and damages, and resulted in a verdict rendered on August 14, 1967, in respondent's favor in the amount of $80,000.00 (App. E, page 12a). Upon petitioner's timely alternative motion for judgment notwithstanding the verdict or for a new trial or remittitur, Judge Real, on September 26, 1967 entered an order denying judgment notwithstanding the verdict and granting the motion for a new trial unless respondent should file a remittitur of all the verdict in excess of $20,000.00 adding that if such remittitur was filed, the motion for a new trial was denied (App. F, page 13a). There being no remittitur or further motions filed, the

case was tried for a second time before Senior Judge Charles F. McLaughlin for a period of two weeks and resulted in a verdict entered on March 18, 1968, in respondent's favor, in the amount of $25,000.00 (App. G, page 14a).

Respondent, after proceeding with the second trial and disappointed with its result, appealed to the United States Court of Appeals for the District of Columbia Circuit on April 16, 1968 (R. 79), complaining for the first time of the remittitur order which had been entered after the first trial. In his brief in the Court of Appeals, he raised the issues, not raised in the trial court, that remittitur practice in F.E.L.A. cases was unconstitutional, and that the grant of the remittitur constitued an abuse of discretion.

The respondent replied, its brief meeting these arguments and pointing out the settled pronouncements of this Court that orders granting or denying new trials or remittiturs should not be disturbed on appeal where the action of the trial court finds some support in the record. The petitioner emphasized to the Court of Appeals that the record contained more than ample support for the action of the trial court. The case involved a wrist injury necessitating a surgical fusion resulting in a 15% increase of a pre-existing disability of the wrist, as well as a claim of a stomach ulcer which first occurred two years after the accident, necessitating the removal of a majority of plaintiff's stomach, with claimed special damages of approximately $5,000.00 for each of these conditions. The record disclosed that the discomfort of the wrist condition was "moderate" and that no nerve damage was involved (R. 152). The relationship of the stomach ulcer to the accident was doubtful. The physician who had

treated respondent for many years was unable to find any causal relationship (R. 226, 227). A highly qualified gastroenterologist testified that the cause of ulcers is unknown, even in the latest medical literature (R. 241, 242, 255). An uncertified practitioner of internal medicine who had never treated the respondent testified, however, that there was a causal relationship between the accident and the ulcer (R. 171), basing his opinion largely upon certain drugs taken by respondent, although he admitted giving a prior medical opinion that respondent's ulcer was "more than likely completely coincidental and unrelated" (R. 179). He admitted that he did not know the dosage of the drugs such as aspirin and bufferin to which he attributed the ulcer, or the sensitivity of the plaintiff to these drugs, and that his opinion was based on facts and history apart from those stated in the hypothetical question (R. 179, 183-185). The trial court, after observing the qualifications, demeanor and credibility of this witness indicated that the opinion on causal relationship was "weak" (R. 186). Other facts, including the respondent's ability to work at his usual job on a regular basis (R. 121, 125), the minimal residual effects of the stomach operation (R. 120, 133), the absence of visible cosmetic disfigurement (R. 120), and the absence of any evidence of future impaired earning capacity (this claim stricken by the trial court for want of evidence [R. 272]) were also presented to the Court of Appeals as showing support in the record for the action of the trial judge in exercising its direretion in granting the remittitur.

The Circuit Court of Appeals, however, did not limit its review of the case to a determination of whether the action of the trial court found support in the record.

It took an entirely different approach, making its own evaluation of the evidence from the transcript to determine whether the quantum of damages found by the jury was clearly within the "maximum limit of reasonable range" which limit the Circuit Court of Appeals apparently set upon its own review of the record. This was done despite the Appellate Court's acknowledgment of the deference due the trial court because of its unique opportunity to consider the evidence in the living courtroom context.

The Circuit Court of Appeals, after applying its novel approach to the facts of this case, found that the jury verdict was within its concept of a maximum limit of a reasonable range, and vacated the remittitur, setting aside the judgment entered upon the second trial, and directing that the judgment on the verdict as returned at the first trial be reinstated (App. A, page 1a).

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting a Writ of Certiorari in this case, wherein the Circuit Court of Appeals, in conflict with recent pronouncements of this Court, has reversed the discretionary grant of a new trial or remittitur entered by the district court. The case, brought under the Federal Employers' Liability Act (45 U.S.C. § 51, et seq.), involves questions of national importance in the administration of justice, since it is concerned with an appellate court's encroachment upon the trial court's exercise of judicial discretion in the consideration of a motion for a new trial under Rule 59(a), Federal Rules of Civil Procedure.

Pursuant to Rule 59(a), Federal Rules of Civil Procedure, the district courts are authorized to grant new trials in jury actions ". . . for any reasons for which new trials have been granted in actions at law . . .". The genesis of the grant of new trials coupled with a remittitur was reviewed at length by this Court in the case of *Dimick* v. *Schiedt,* 293 U.S. 474 (1935). Since then, this Court has indicated an affirmative duty upon the part of the trial court to require a remittitur or new trial if the amount of the damages awarded by a jury is found to be excessive. *Linn* v. *United Plant Guard Workers of America,* 383 U.S. 53, at pages 65-66 (1966).

The discretion entrusted to the trial courts in ruling upon motions for new trials has not been extended to the appellate courts. In *Fairmont Glass Works* v. *Cub Fork Coal Co.,* 287 U.S. 474 (1933), this Court (at page 481-482) announced the settled rule, applied also where the jury verdicts are excessive or inadequate, that a decision on a motion for a new trial is not reviewable for error of fact, as such a decision is a matter within the discretion of the trial court. The Court commented (at page 485), that "... Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct". Other statements of this limitation upon appellate courts in their review of the trial court's decisions on a motion for new trial or remittitur are found in *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U.S. 69, at page 75 (1889) and *Union Pacific R.R. Co.* v. *Hadley,* 246 U.S. 330, at page 334 (1918). All federal circuits have adopted the view that orders granting or denying new trials may be reviewed only to determine whether there was an abuse

by the trial court of its discretion. See cases collected at 3 W. Barron and A. Holtzoff, Federal Practice and Procedure § 1302.1, pp. 349-350; 6A J. Moore, Federal Practice ¶ 59.08[6], pp. 3836-3840.

The criteria established by this court by which the federal appellate courts are to approach the question of an abuse of discretion on the part of the trial court was referred to in *Neese* v. *Southern Railway Company*, 350 U.S. 77 (1955). In *Neese*, also brought under the Federal Employers' Liability Act, the trial court granted a new trial unless the plaintiff should remit $10,000.00 from the jury verdict. The Fourth Circuit (*sub nom*) *Southern Railway Company* v. *Neese*, 216 F.2d 772 (1954) reversed, holding that a new trial should be had as to damages, as its appraisal of the evidence did not justify an award as high as the remitted figure. This Court reversed the Fourth Circuit's decision, and reinstated the action of the trial court, stating (350 U.S., at page 77):

> "Even assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

Thus, this Court set the criteria to be used by the appellate courts as to whether the trial court was guilty of an abuse of discretion in its grant of a motion for a new trial or remittitur. Under this standard, the appellate court is not to independently appraise the

evidence so as to determine what it thinks is a proper amount that a jury could assess; rather, its function is limited to a determination as to whether or not there is some support in the record for the ruling of the trial judge, and if so, then his ruling must be affirmed. This standard, with its limitation upon the power of the Courts of Appeal to independently appraise the value of a case, was vividly demonstrated and reaffirmed in this Court's decision in *Gruenthal* v. *Long Island RR. Co.*, 393 U.S. 156 (1968), decided this term prior to the decision in the case at bar, and which involved an appellate reversal of a trial court's denial of a motion for a new trial or remittitur.

The cases of *Neese* and *Gruenthal, supra,* clearly indicate that it is the function of the trial courts, and not the appellate courts, to evaluate the reasonableness or unreasonableness of jury verdicts in considering the evidence or lack thereof, assessing the weight of the testimony, the credibility of the witnesses, and the other factors available to the trial court in making the determination as to whether or not an injustice was done. However, the Court below took an approach which conflicts with these decisions, and committed the same error which was committed by the circuit courts in *Neese* and *Gruenthal, i.e.,* while paying lip service to the deference due the trial judge who had the opportunity to see and hear the witnesses and evidence, they nevertheless proceeded to substitute their independent appellate estimates of the monetary value of those cases based only upon a reading of a cold transcript.

The approach taken by the Circuit Court of Appeals below in determining whether or not the trial judge abused his discretion provides a clear example of how

that Court misconstrued its appellate function. Instead of reviewing the record to determine whether there was support for the action of the trial judge under *Neese* and *Gruenthal,* the Court reviewed the record (apparently discounting the credibility and demeanor of the witnesess and the impact of the evidence or lack of evidence), and proceeded to determine whether the original jury verdict was in agreement with its own idea of a reasonable verdict range, an approach in conflict with the pronouncements of this Court.

The basis for the disagreement between the decision of the trial court in the case at bar and the decision rendered by the Court of Appeals is obvious. The Circuit Court of Appeals accepted the evidence at its face value from the record, whereas the trial court, with its first hand assessment of the credibility of the witnesses and the evidence in making the determination as to whether an injustice had been done, did not. The discretion of the trial court to make such a first hand assessment was commented upon in the recent case of *Altrichter* v. *Shell Oil Co.,* 263 F.2d 377 (1959), wherein the Circuit Court of Appeals for the Eighth Circuit held that in acting upon a motion for a new trial, the trial court may weigh the evidence, may disbelieve witnesses, and may grant a new trial even where there is substantial evidence to the contrary, quoting the following passage from the late Judge Parker in *Aetna Casualty and Surety Co.* v. *Yeatts,* 122 F.2d 350, at page 352 (4th Cir., 1941):

> "On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or will result is a miscarriage of justice, even though there may be sub-

stantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

The decision below, in conflict with *Neese* and *Gruenthal,* supra, not only sets an impractical precedent in the Federal Courts as to the standards of appellate review of discretionary rulings of the trial courts, but also serves to present a real dilemma to the trial courts and the likelihood of an impediment to the administration of justice. Under the decisions of this Court, a trial court could validly remedy an excessive or inadequate verdict in the exercise of its judicial discretion, provided that such action found support in the record. However, under the holding below, the trial court's action must be based not only upon its discretion and experience predicated upon its firsthand knowledge of the case, but seemingly, must also be based upon the concept of a maximum limit of reasonable verdict range to be subsequently applied by an appellate court upon a review of the transcript. It is submitted that it would be an impossible task for any trial judge, no matter how experienced, to predict with any degree of accuracy the range of verdicts to be subsequently applied by an appellate court based upon a cold record. The import of this dilemma is highlighted when the trial court must make such a judgment at the risk that a second trial (as in the instant case, which lasted for two weeks, and which produced a verdict in approximate agreement with the remittitur order) will go for naught, to the detriment of the crowded dockets of the federal trial courts.

Should this dilemma and attendant risk make the trial courts hesitant to exercise their judicial discre-

tion and decline to grant a new trial or remittitur in cases of excessive verdicts, the trial courts would then be in violation of their affirmative duty to correct such excesses imposed by this Court in *Linn* v. *United Plant Guard Workers of America, supra,* and would present an impediment to the administration of justice to litigants in the federal courts, both at the trial and appellate levels.

It is submitted that since the decision below is in conflict with the recent decisions of this court, encroaches upon the judicial discretion entrusted to the trial courts in their consideration of motions for new trials in cases of excessive verdicts, and presents the likelihood of an impediment to the administration of justice, said decision should be reversed, or the case be remanded to the Court of Appeals for reconsideration in conformity with the standards of review as enunciated by this Court.

CONCLUSION

Wherefore, for the foregoing reasons it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN A. TRIMBLE
916 Union Trust Building
Washington, D. C. 20005
Attorney for Petitioner

Of Counsel:

HAMILTON AND HAMILTON
916 Union Trust Building
Washington, D .C. 20005

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968

No. 21,970

ALONZO WAYNE TAYLOR, *Appellant,*

v.

WASHINGTON TERMINAL CO., *Appellee.*

Appeal from the United States District Court for the District of Columbia.

Before: BAZLON, *Chief Judge;* WRIGHT and ROBINSON, *Circuit Judges.*

Judgment

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the judgment of the District Court appealed from herein be, and it is hereby, vacated, and it is

FURTHER ORDERED AND ADJUDGED by this Court that the order of the District Court dated September 26, 1967, granting a new trial, be, and it is hereby, set aside, and it is

FURTHER ORDERED AND ADJUDGED by this Court that the original verdict in favor of the appellant dated August 14, 1967, is hereby reinstated; and the District Court is hereby directed to enter a judgment based on the original verdict returned at the first trial.

Per Curiam

For the Court:
/s/ NATHAN J. PAULSON
Nathan J. Paulson
Clerk

Dated: February 20, 1969.

Opinion by Circuit Judge Wright.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,970

ALONZO WAYNE TAYLOR, *Plaintiff*,

v.

THE WASHINGTON TERMINAL COMPANY, *Appellee*.

Appeal from the United States District Court for the District of Columbia

Decided February 20, 1969

Mr. James R. Scullen for appellant.

Mr. Stephen A. Trimble, with whom *Mr. Thomas A. Flannery* was on the brief, for appellee.

Before: BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

WRIGHT, *Circuit Judge:* Appellant Taylor sued appellee railroad under the Federal Employees Liability Act[1] for personal injury resulting from appellee's alleged negligence. A jury returned a verdict of $80,000 for appellant. The railroad moved for a new trial on the ground that the verdict was excessive,[2] and the District Court granted the motion, with the proviso that it should be denied if appellant made a remittitur of $60,000. Appellant refused to make the remittitur, and the case proceeded to a second

---

[1] 45 U.S.C. §§ 51-60 (1964).

[2] Rule 59(a), FED. R. CIV. P., provides in pertinent part:

"A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States * * *."

trial. Again a verdict was returned for appellant, though this time only $25,000 in damages was awarded. On appeal Taylor argues that the trial judge abused his discretion in granting the remittitur.[3] We set aside the District Court's order of a new trial and order reinstatement of the original verdict for appellant.

I

Appellant Taylor is a fireman employed by appellee, a railroad company which functions primarily as a switching terminal. On July 28, 1963, in the course of his duties, Taylor alighted from a diesel engine which he was inspecting, and after taking a few steps tripped over an electric cable which was lying on the walkway between the tracks. As he fell he struck his arm against a steel water plug. The evidence established to the satisfaction of the jury what is not in dispute here—that the railroad was negligent in allowing the cable to be where it was.

Appellant was taken to a hospital, his arm was placed in a cast, and he was released. He experienced persistent pain in his wrist, and upon the recommendation of two doctors underwent an operation some month later in which his wrist was fused into an immovable joint.[4] Even after the operation, pain and swelling persisted in the wrist, so that he could perform only light duty in his job for some months. During this period he consistently took aspirin for relief of the pain.

In August 1965, more than two years after the accident and more than a year after the operation on his wrist, Taylor complained of pains in his stomach. Within a few

[3] Appellant also raises statutory and constitutional arguments against the device of remittitur which, in view of our disposition of the case, we do not reach.

[4] Appellant had a pre-existing 25 per cent permanent disability in his wrist. The fusion operation left him with a 40 per cent permanent disability.

days he was admitted to the hospital, where he was determined to have a duodenal ulcer. He was hospitalized again in September when the ulcer began to bleed, and in November he underwent an operation in which 75 per cent of his stomach was removed.

After the operation he returned to work and was still working at the time of the first trial in 1967. He experienced intermittent stomach pains, nausea and difficulty in swallowing as well as continuing though not constant pain in his wrist. Appellant showed special damages of something over $10,000 in wages lost and medical expenses, about half of which were attributable to the writs injury and about half to the ulcer.

A major issue litigated at trial was the causal relationship between the original injury to appellant's wrist, with its consequent pain, corrective surgery and medication, and the development of his ulcer. The medical testimony on this question was divided. The railroad doctor who had treated appellant testified that no causal link could be established. A second doctor, who had done research in the field of gastric disorders, testified that in the present state of medical knowledge the cause of a particular ulcer could not be determined with certainty. A third doctor was satisfied that the steady ingestion of salicylates to relieve the pain of the wrist injury, coupled with the stress brought about by that injury, had caused appellant's ulcer. He gained some support from the second doctor who, while unable to locate a cause of the ulcer, testified that his research had shown aspirin and related medications to accompany the worsening of ulcers.

II

Appellant argues that the trial judge's order of remittiture at the close of the first trial was an abuse of discretion. Appellee argues first that this question is not properly before us on this appeal, and second that it was

within the trial judge's discretion to find the verdict of $80,000 excessive.

With respect to the railroad's jurisdictional contention, we find that the remittitur order is properly before us for review. The grant or denial of a new trial is not a final judgment, and hence is not appealable.[5] However, when an appealable final judgment is entered, appeal brings up the entire record for review, including interlocutory orders.[6] Thus the grant of a new trial may be reviewed upon appeal of a judgment granted after the second trial.[7]

A more difficult question is the scope of appellate review of an order granting a new trial. It is by now standard doctrine that such orders may be reviewed for abuse of discretion, even when based upon such broad grounds as the trial judge's conclusion that the verdict was excessive or was against the weight of the evidence.[8] There has been much discussion of the content which should be given to the elusive phrase "abuse of discretion," with the weight of learning against appellate reversal except in relatively rare cases.[9]

---

[5] 6A J. MOORE, FEDERAL PRACTICE ¶ 59.15 [1], pp. 3891-3892 (2d ed. 1966).

[6] *Id.*, ¶ 59.15[3], p. 3901.

[7] 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1302.1, p. 346 (Wright ed. 1958).

[8] All Circuits except the Eighth have recognized this power of review. 3 W. BARRON & A. HOLTZOFF, *supra* Note 7, § 1302.1, pp. 349-350; 6A J. MOORE, *supra* Note 5, ¶ 59.08[6], pp. 3836-3840.

[9] A popular slogan is that the appellate court should reverse the trial court's denial of a motion for a new trial on the ground of excessive verdict only when the damage award is "monstrous." *See Affolder* v. *New York, Chicago & St. Louis R. Co.*, 339 U.S. 96, 101 (1950). Professor Charles Wright has been a leading exponent of extremely limited review of trial judges' dispositions of motions for new trial. *See* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

This learning has largely arisen from consideration of cases in which motions for new trial—especially on the ground of excessive verdict—have been *denied*.[10] Two factors unite to favor very restricted review of such orders. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record.[11] The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages. This second factor is further weighted by the constitutional allocation to the jury of questions of fact.[12]

Where the jury finds a particular quantum of damages and the trial judge refuses to disturb its finding on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial. However, where, as here, the jury as primary fact-finder fixes a quantum, and the trial judge indicates his view that it is excessive by granting a remittitur, the two factors oppose each other. The judge's unique opportunity to consider the evidence in the living

---

[10] The discussions of reviewability of dispositions of motions for new trial on the ground of excessive verdict in Wright, *supra* Note 9, 3 W. BARRON & A. HOLTZOFF, *supra* Note 7, § 1302.1, and 6A J. MOORE, *supra* Note 5, ¶ 59.08[6], are almost entirely in terms of the desirability or undesirability of appellate review of damage awards set by juries and left undisturbed by trial courts.

[11] 6A J. MOORE, *supra* Note 5, ¶ 59.05[5].

[12] Barron and Holtzoff (for whom Professor Wright is the reviser) note that appellate decisions reversing trial courts' denials of new trials on grounds of excessive verdict "are difficult to reconcile with the Seventh Amendment, which provides that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the common law.' * * * *" 3 W. BARRON & A. HOLTZOFF, *supra* Note 7, § 1302.1, p. 350.

courtroom context must be respected. But against his judgment we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance—the jury—has evaluated the facts differently.[13]

In this jurisdiction particularly, District Court judges have given great weight to jury verdicts. They have stated that a new trial motion will not be granted unless the "verdict is so unreasonably high as to result in a miscarriage of justice," [14] or, most recently, unless the verdict is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." [15]

At the appellate level, in reviewing a trial judge's grant of a new trial for excessive verdict, we should not apply the same standard. The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a

---

[13] In taking this approach, we follow the lead taken by the Third Circuit *en banc* in a similar case. In *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79, *cert. denied*, 364 U.S. 835 (1960), that court reversed a trial court's grant of a new trial because the verdict was against the weight of the evidence. The court distinguished between cases where a new trial is granted because of some legal error and cases in which the trial judge simply reweighed evidence already submitted to a jury. In cases of the latter sort (in which grants of new trials for excessive general damages must be included), "the [trial] judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial." 278 F. 2d at 90.

[14] *Frank* v. *Atlantic Greyhound Corp.*, D. D.C., 172 F. Supp. 190, 191 (1959).

[15] *Graling* v. *Reilly*, D. D.C., 214 F. Supp. 234, 235 (1963).

new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within "the maximum limit of a reasonable range."

III

Here we find that this standard for reversing the grant of a new trial is met. Before the accident, appellant was a man in his middle thirties with a partial disability to his wrist. The accident led to a fusion of the wrist, with consequent pain and approximately $5,000 worth of special damages, and a further permanent wrist disability. This in itself could not have supported an $80,000 verdict. But on the divided medical testimony the jury could have reasonably concluded that the accident proximately caused him to develop an ulcer.[16] The ulcer caused considerable pain and discomfort, and led eventually to the removal of 75 per cent of appellant's stomach.

---

[16] Appellee urges us to affirm the remittitur order on two alternate theories. The first is the usual one for remittitur: that on all the evidence porperly before the jury, taken in the best light for plaintiff, the verdict was outside a reasonable range. The second is a novel combination of two traditional grounds for grant of a new trial: that while there was sufficient evidence that the ulcer was proximately caused by the accident for the jury to consider that question, its apparent conclusion that such a causal link existed was against the weight of the evidence, so that the portion of the verdict attributable to the ulcer might reasonably be ordered remitted under threat of a new trial.

We have found no cases holding, and no scholarly comment suggesting, that a remittitur can be ordered because part of the quantum is attributable to a factual inference which the trial judge thinks is against the weight of the evidence. In the absence of any statement by the trial judge that he was relying on any such novel ground, we decline to construct a new theory for granting a new trial at the appellate level. Rule 59 permits the grant of a new trial only "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States * * *." *See* Note 2, *supra.*

Thus the jury could reasonably have awarded substantial general damages for the pre-trial period alone, based on pain and suffering. Further, there was testimony that a 10 per cent chance of the ulcer's recurrence remained. Projecting the pain and suffering, the anxiety, and the loss of enjoyment of life reasonably traceable to this stomach condition over appellant's life expectancy, it would be difficult to conclude that an $80,000 award was not clearly within the range of reasonable jury verdicts. And where as here it is clear that the jury has stayed within the reasonable range, the deference due its findings of fact outweighs the deference due the trial judge's first hand review of the evidence. Accordingly, the judgment must be vacated, the order granting the second trial must be set aside, and judgment must be entered on the verdict returned at the first trial.

So ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968

No. 21,970

ALONZO WAYNE TAYLOR, *Appellant,*

v.

WASHINGTON TERMINAL CO., *Appellee.*

Before: BAZELON, *Chief Judge;* WRIGHT and ROBINSON, *Circuit Judges,* in Chambers.

Order APR 8 1969

On consideration of appellee's petition for rehearing, it is

ORDERED by the Court that appellee's aforesaid petition is denied.

Per Curiam.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

NATHAN J. PAULSON
Clerk

April 8, 1969

Thomas A. Flannery, Esquire
Stephen A. Trimble, Esquire
916 Union Trust Building
Washington, D. C. 20005

Re: No. 21,970—*Alonzo Wayne Taylor* v. *Washington Terminal Co.* Civil Action 139-64

Dear Sir:

Enclosed is a copy of the order denying your petition for rehearing. Your suggestion that this case be reheard *en banc* was transmitted to the full Court, and the purpose of this letter is to inform you that there not being a majority of the judges in regular active service in favor of having this case reheard *en banc*, it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

NATHAN J. PAULSON, *Clerk*

By: A. L. STEVAS
Alexander L. Stevas
Chief Deputy Clerk

ALS/gb

cc: James R. Scullen, Esquire
648 Warner Building
Washington, D. C.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 139-64

ALONZO WAYNE TAYLOR, *Plaintiff*,
v.
WASHINGTON TERMINAL CO., *Defendant*.

Verdict and Judgment

This cause having come on for hearing on the 7th day of August, 1967, before the Court and a jury of good and lawful persons of this district, to wit:

Ellsworth M. Walker	Nelson R. Weedon
Mrs. Alberta C. Brown	Mrs. Cora L. Segears
Robert C. Johnson	Mrs. Lola S. Allen
Miss Margaret A. Parmeter	Mrs. Mary A. Wills
Mrs. Esther E. Smith	Miss Elinor J. Kindelberger
John V. Sotheren	Mrs. Florence R. Laraby

who, after having been duly sworn to well and truly try the issues between ALONZO WAYNE TAYLOR, plaintiff and WASHINGTON TERMINAL CO., defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 14th day of August, 1967, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of Eighty Thousand Dollars ($80,000.00).

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of Eighty Thousand Dollars ($80,000.00); together with costs.

ROBERT M. STEARNS, *Clerk*

By SOPHIE LYMAN
Deputy Clerk.

Judge MANUEL L. REAL
Presiding

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 139-64

ALONZO WAYNE TAYLOR, *Plaintiff*,

v.

THE WASHINGTON TERMINAL COMPANY, *Appellee*.

Order

The defendant THE WASHINGTON TERMINAL COMPANY having heretofore filed (1) Motion For Judgment Notwithstanding The Verdict, (2) For A New Trial Or Remittitur, on August 22, 1967, and each of the parties having filed memoranda of Points and Authorities, and the Court having considered the points and authorities of the respective counsel and the files, records and pleadings and having presided at the trial of the matter,

IT IS ORDERED THAT the motion For Judgment Notwithstanding The Verdict herein is denied.

IT IS FURTHER ORDERED that the Motion For A New Trial is granted unless the plaintiff shall produce and file in the office of the clerk of this Court a remittitur of all of the verdict in excess of $20,000.00.

In case such remittitur is filed on or before October 10, 1967, the motion for a new trial is denied.

Dated: September 21, 1967

MANUEL L. REAL
Manuel L. Real
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 139-64

ALONZO WAYNE TAYLOR, *Plaintiff*,

v.

WASHINGTON TERMINAL CO., *Defendant*.

Verdict and Judgment

This cause having come on for hearing on the 6th day of March, 1968, before the Court and a jury of good and lawful persons of this district, to wit:

1. Alfred A. Cook
2. Fannie A. Lindsey
3. William H. Lawrence, Jr.
4. Viola W. Patterson
5. Georgia L. Williams
6. Mary M. Richter
7. Sylvene Owens
8. Lucille C. Richardson
9. William A. Richards
10. Shelby L. Roberts
11. Helen M. Woody
12. Jack Markel

who, after having been duly sworn to well and truly try the issues between Alonzo Wayne Taylor, plaintiff and Washington Terminal Company, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 18th day of March, 1968, that they find the issues aforesaid in favor of the plaintiff Alonzo Wayne Taylor and that the money payable to him by the defendant Washington Terminal Co. by reason of the premises is the sum of ($25,000.00) Twenty five thousand dollars

WHEREFORE, it is adjudged that said plaintiff Alonzo Wayne Taylor recover of the said defendant Washington

Terminal Co. the sum of Twenty five thousand dollars together with costs.

ROBERT M. STEARNS, *Clerk*

By MERIAM M. JENKINS
Deputy Clerk.

Judge Charles F. McLaughlin
Presiding